86-544

No.

Supreme Court, U.S.
FILED
SEP 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JEROME KENNEDY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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25 pp

QUESTIONS PRESENTED

1. Whether Petitioner's good faith belief in his right to mitigate his contract losses by unilaterally selling deteriorating milk obviated criminal intent to commit theft?

2. Whether conduct by Petitioner's attorney tending to bring Petitioner's credibility into disrepute before the jury constituted a denial of effective representation?

3. Whether a question on cross-examination pertaining to verbal conduct by Petitioner constituted hearsay?

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In The

Supreme Court of the United States

October Term, 1986

JEROME KENNEDY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Jerome Kennedy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on August 5, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported. A copy of the opinion is reprinted in the Appendix hereto.

JURISDICTION

On September 12, 1985, Petitioner was found guilty of thirteen counts of theft by the United States District Court for the Northern District of Illinois, Western Division. Pursuant to 28 U.S.C. § 1291, Petitioner appealed that judgment to the United States Court of Appeals for the Seventh Circuit. That court affirmed the judgment on August 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1.

STATEMENT OF THE CASE

Petitioner, Jerome Kennedy, was charged by indictment in the United States District Court for the Northern District of Illinois, Western Division, with thirteen counts of theft, in violation of 18 U.S.C. § 641, of nonfat dried milk belonging to the Commodity Credit Corporation ("CCC"), an arm of the Department of Agriculture. Following a jury trial, Petitioner was convicted and sentenced to concurrent terms of five years imprisonment, fined, and required to pay restitution. The United States Court of Appeals for the Seventh Circuit affirmed the conviction in a decision entered August 5, 1986.

The evidence showed that Petitioner was the managing officer of the Green River Development Corporation ("Green River"), which principally managed warehouses located near Dixon, Illinois. On July 23, 1980, Green River entered into a contract with CCC for the storage of various commodities, including 16 million pounds of dry milk.

During 1982 CCC ceased sending commodities to the facilities of Green River and began the outward movement of those commodities already stored there. By November 1984, only two million pounds of milk were still warehoused. By then the dry milk, the oldest in the nation at the time, was seriously deteriorating. For instance, one purchaser rejected and returned a shipment to Green River because of extensive rodent damage and insect infestation. Petitioner, therefore, had an employee make a list of all of the oldest milk in storage. From such list, Petitioner sold the eleven loads of milk in December of 1984, and the two additional loads in January of 1985, totalling 535,000 pounds of milk, from which the instant charges of theft arose.

On behalf of the government, Daniel Wudtke testified that he was in charge of obtaining storage space for dairy products on behalf of the CCC, and he testified that Petitioner had received no authorization to sell the milk and that the CCC had not received any proceeds from any of the sales. Wudtke stated that he had contacted Kennedy near the end of January 1985 and that Petitioner had freely admitted having sold the milk in question, although he disputed the total amount sold.

George Mendez, also testifying for the government, stated that he operated a salvage business and had been the person who had purchased the deteriorated milk from Petitioner. Petitioner had told Mendez that the problem was that the milk was outdated and that he was waiting for authorization to sell. There were a total of thirteen separate sales, totalling $267,850 paid for the milk. Mendez stated that the milk was damaged and deteriorated with rodent stains, rodent droppings, and other similar contamination.

Frank Weiman, an agricultural marketing specialist with CCC, testified that Petitioner had contacted him near the beginning of December 1984, concerning Petitioner's own offer to purchase the milk product then in Green River's warehouses. Nothing, however, developed from such telephone conversation. Weiman testified that, of the 1,200,000 pounds of milk the government found still in storage at Green River at the time the warehouses were sealed, all had to be sold for animal feed and salvage because of substantial rodent activity and rodent damage.

The evidence showed that Petitioner spent some of the proceeds from the sale at issue in paying his personal and business debts. Petitioner had a net worth of $16,000,000, but was involuntarily brought into bankruptcy at the time of trial. Checks delivered by Mendez to Petitioner for the payment of the contaminated milk had been made payable to Philadelphia Corporation, or to Petitioner personally. Petitioner was Chairman of the Board of the Philadelphia Corporation.

On behalf of the defense, Virginia Guenther testified that she worked as a typist for Petitioner and had, on three separate occasions during 1984, at Petitioner's request, typed a letter from Petitioner to CCC, requesting that CCC remove all of its commodities by November 1984, and stating that, upon CCC's failure to comply, he would dispose of the commodities. Petitioner himself testified that he was concerned that, as the milk continued to deteriorate and was becoming moldy and infested with insects and so forth, he was responsible for the condition of the milk and would be liable for its diminution in value. Petitioner testified that he believed it was better to dispose of the contaminated milk to offset his losses, rather than let it become completely wasted and be liable for the full amount. He testified that he had discussed with

Elmer Forrest of CCC his intention to terminate the contract and that he had requested that all of the milk be immediately removed by CCC.

The government denied receiving any letters of termination sent by Petitioner, and a stipulation between the government and the defense counsel informed the jury that Elmer Forrest, if he were to testify, would state he did not recall any telephone conversation with Petitioner regarding a termination of the contract with CCC.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S GOOD FAITH BELIEF IN HIS RIGHT TO MITIGATE HIS CONTRACT LOSSES BY UNILATERALLY SELLING DETERIORATING MILK OBVIATED CRIMINAL INTENT TO COMMIT THEFT.

In the Court of Appeals Petitioner argued that the evidence was insufficient to establish intent under governing principles, which argument the Court rejected. Petitioner's liberty has been taken away and his reputation has been injured due to errors committed by the trial court and repeated by the Court of Appeals. Petitioner urges that the opinion of the Court of Appeals is in conflict with established legal principles and was wrong under the facts and circumstances. Petitioner's good faith belief that his conduct was not criminally wrongful arose out of the clear import of the operative contract in the case at bar. This contract provided, *inter alia*, as follows:

> "The Warehouseman shall be liable to the government, and pay the government in cash, for damages for loss or injury to contract commodities caused by

> his failure to discharge properly his obligations under this contract and to exercise such care and regard to contract commodities as a reasonably careful man would exercise under like circumstances * * *."

The contract thus provided that Petitioner's company, Green River, could or would be liable for the diminution in value of the milk which was deteriorating in its warehouses. This liability was made real to Petitioner when, in late 1984, approximately 100,000 pounds of milk was rejected by a government purchaser due to extensive rodent damage and insect infestation. Green River was also liable for the freight charges of the rejected milk. The milk, which was the oldest in the nation, was seriously deteriorating, and government witnesses themselves confirmed that at least some of the bags in all of the loads of milk sold by Petitioner were physically damaged by rodents, while most of the other bags of milk had "rodent stains". Five of the eleven loads of milk sold by Petitioner were described as "real bad", as compared to the contamination of the remainder. Petitioner had given due and proper notice throughout 1984 to the government of his intention to terminate the contract. However, despite Petitioner's attempts to terminate the contract with the government, he failed to receive any direction from the government as to the proper steps to be taken to avoid further contract losses. After the rejection of the 100,000 pounds of milk, Petitioner immediately notified the government of the rejection and ordered his foreman to compile a list of the oldest milk then in storage. In December 1984, he began selling the oldest milk. It is established that a warehouseman may sell the goods under his care to mitigate his own loss or damages, and if there is immediate danger of destruction of the stored goods, a warehouseman may lawfully sell the goods *even without notice* to the owner. (*Mitchell v. Munn Warehouse Co.* (1938),

59 Idaho 661, 86 P.2d 174; *Dudley v. Chicago, Milwaukee and St. Paul Railroad Company* (1906), 58 W.Va. 604, 52 S.E. 718; *Jordan v. Shireman,* 28 Ind. 136).

Petitioner's conduct must be judged in the context of the contract between the parties. (*United States v. Leavitt* (10th Cir. 1979), 599 F.2d 355, *cert. den.* 444 U.S. 833; *People v. Scholder* (1956), 143 Cal.App.2d Supp. 836, 300 P.2d 384). Under the contract, Green River was liable for all the deterioration of the milk. The greater the loss, the greater would be its liability. Thus, by 1984 the mere passage of time was working a larceny against Green River. The effect of the contract was to require Green River to purchase by contractual forced sale the goods which were in its care to the extent of the deterioration of the goods and in the amount of the diminution in its value. Petitioner's conduct, within the context of the contract, was aimed in good faith at mitigation of damages. The judgment in the trial court, affirmed by the Appellate Court, that intent exists in the instant case is at odds with this Court's own holding in *Morissette v. United States* (1952), 342 U.S. 246, 273, 72 S.Ct. 240, 256, 96 L.Ed. 288. In *Morissette* the defendant claimed a good faith belief that the property in question had been abandoned by the United States before he appropriated it. This Court found that, although with this claim the defendant could still be liable civilly for the property appropriated, the claim would provide a proper defense to the embezzlement charge because the claim negated that aspect of fraudulent intent necessary to support a criminal conviction. (See, *United States v. Shackelford* (5th Cir. 1982), 677 F.2d 522). So too, in *People v. Lapique* (1898), 120 Cal. 25, 52 P. 40, where the defendant broker sold the vendor's house for a price higher than the asking price and retained the difference as an additional commission,

the court found no criminal embezzlement since the broker's claim was in good faith, even though it was actually untenable under the applicable contract. (See also, *Maheu v. Hughes Tool Co.* (9th Cir. 1977), 569 F.2d 459; *Hylton v. Phillips* (Or. 1974), 529 P.2d 906).

Since the contract in the case at bar made Petitioner liable for the deterioration of the stored milk, it follows that the contract impliedly permitted Petitioner to mitigate his loss; at the very least Petitioner believed that he had such a right. "Specific intent depends upon a state of mind, not upon a legal fact." (*Richardson v. United States*, (D.C. Cir. 1968), 403 F.2d 574, 576).

The Court of Appeals relied upon two points in finding that criminal intent was proved. First, the court claimed that financial problems gave Petitioner a motive; and second, that Petitioner had misrepresented to Mendez, the purchaser of the milk sold by Kennedy, that he received periodic authorization from the CCC to sell the outdated milk. The record, however, fails to support either claim since the evidence shows that Kennedy had a personal net worth of $16,000,000. Also, no claim was made to Mendez of periodic authorization; rather, Kennedy merely claimed at the start of the series of transactions that he had hoped to obtain authorization, but then subsequently proceeded unilaterally to sell the outdated and deteriorated milk.

The issue presented here is important to the nation as a whole in that the government has attempted to criminalize conduct which simply is not wrongful. Although Kennedy was civilly liable to the government for the proceeds obtained, he committed no theft.

II.

THE CONDUCT OF PETITIONER'S ATTORNEY, WHICH BROUGHT PETITIONER'S CREDIBILITY INTO DISREPUTE BEFORE THE JURY, CONSTITUTED A DENIAL OF EFFECTIVE REPRESENTATION UNDER THE STANDARDS ANNOUNCED BY THIS COURT IN *STRICKLAND v. WASHINGTON* (1984), 761 U.S. 394, 104 S.Ct. 2052, 80 L.Ed.2d 674.

At trial Petitioner and his typist, as well as documentary evidence presented, established that, during 1984, Petitioner attempted to terminate his contract with the CCC. This fact the government contested. Central to the dispute was Petitioner's claim that Elmer Forrest, of CCC, was aware of his letters and had acknowledged receipt of them. Petitioner was extensively cross-examined concerning his conversations with Forrest, and at the conclusion of the testimony the prosecutor complained to the trial judge that Elmer Forrest was in Kansas City and would not be in court until the following day. The court then urged the defense attorney to stipulate to the testimony of Forrest because the court did not want to delay the case another day. The defense attorney, however, responded that he did not know what the testimony of Forrest was and that he had never spoken to Forrest himself. After a break, however, the prosecutor and defense attorney reached a stipulation that Forrest would testify that he was employed by CCC, that he could not recall a telephone conversation with Kennedy concerning the termination of the contract, nor any correspondence regarding such termination. Thus, while Petitioner took the stand and under oath testified to one thing, his defense attorney stood up in court and stipulated to the exact opposite. A jury, which had to adjudicate the truthfulness of Petitioner's testimony, was informed that, in at least one important aspect of such testimony, his coun-

sel agreed with the government that such was not credible. No tactical or strategic advantage can inure to Petitioner's benefit from a stipulation informing the jury that Petitioner had lied.

The Court of Appeals, however, concluded that such was good trial strategy and saved Petitioner from harm "that was almost certain to occur if Forrest were called to testify and then called the defendant a liar in open court." (Appendix pg. A-6). Clearly, the Court of Appeals had no basis to determine what, if anything, Forrest would testify to, much less that Forrest would in fact call Petitioner a liar. It is more logical to conclude that, had Forrest testified, he would have affirmed that Petitioner was telling the truth; but had he otherwise testified, as the government had suggested, that he merely could not recall seeing the letters of Petitioner, an effective cross-examination would have made clear to the jury that in fact Forrest was not disputing the truth of Petitioner's testimony. In either event, Forrest's testimony could only have added to and not subtracted from the veracity and credibility of Petitioner's testimony. In a case which was otherwise close in its facts, the stipulation of the defense counsel clearly constituted ineffective representation under *Strickland.*

III.

IF THE WRIT IS GRANTED, PETITIONER WOULD SEEK REVIEW OF THE TRIAL COURT'S PLAIN ERROR IN REFUSING TO ALLOW CRUCIAL EVIDENCE CORROBORATING THE DEFENSE.

A government witness, Robert Maresh, testified that he recalled various government inspectors on the premises during 1984, and on cross-examination was asked the following question: "Do you ever remember any of the

conversation between Mr. Kennedy and some of the inspectors when Mr. Kennedy commented about their getting their milk out of the warehouse?" (Transcript 212).

The prosecution objected to the question on grounds of hearsay, and the trial court sustained the objection. Petitioner's post-trial motion complained that the trial court erred when it sustained objections made by the prosecutor to questions asked by Petitioner's counsel. Citing *United States v. Nero* (7th Cir. 1984), 733 F.2d 1197, 1207, the Court of Appeals ruled that the argument was waived.

The error was plain. The question went to the heart of Petitioner's defense. Had Petitioner asked government inspectors to get CCC's milk out of the warehouse, such conduct would have corroborated Petitioner's claim that he had also written CCC, making the same request; and such would further have corroborated Petitioner's claim that, due to his concern over the deterioration of the milk, his primary interest was getting the milk out of his warehouse. It is elemental that the hearsay doctrine under 28 U.S.C. Fed. Rule of Evid. 801(c) does not reach statements which have probative worth merely by virtue of the fact that such statements were uttered. (*United States v. Keane* (7th Cir. 1975), 522 F.2d 534, 558; *United States v. Parry* (5th Cir. 1981), 649 F.2d 292). Such statements are verbal conduct and are admissible as circumstantial evidence limited to their nontestimonial nature. (6 Wigmore, Evidence (Chadborn rev. 1976), §§ 1766, 1788).

The probative worth of testimony that Petitioner had in fact told government inspectors to get the milk out of the warehouses was not to prove the truth or falsity of the statement in issue, but rather "is similar to an order, and is not capable of being true or false, and thus it is not offered for the truth of any matter asserted." (*United*

States v. Keane, supra, 522 F.2d at 558). Had the Court of Appeals dealt with the issue on the merits, that court would have reversed the judgment entered; but by having ruled the matter waived, the Court of Appeals erroneously avoided the issue.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted and the matter reviewed and reversed, or such other relief granted as may be just and equitable.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2645

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEROME KENNEDY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 85 CR 20006—**Stanley J. Roszkowski,** *Judge.*

ARGUED MAY 8, 1986—DECIDED AUGUST 5, 1986

Before CUMMINGS, *Chief Judge,* and BAUER and ESCHBACH, *Circuit Judges.*

BAUER, *Circuit Judge.* Defendant Jerome Kennedy was convicted of thirteen counts of knowingly and without authority selling 537,700 pounds of nonfat dried milk belonging to the Commodity Credit Corporation ("CCC") of the United States Department of Agriculture ("USDA") in violation of Title 18, U.S.C. § 641. The court sentenced the defendant to concurrent periods of five years imprisonment for all thirteen counts, administered a fine of $20,000, and ordered defendant to make restitution to the Commodity Credit Corporation in the amount of $267,850. On appeal, the defendant presents three principal arguments. First, he argues that the evidence was insufficient to es-

tablish specific intent to deprive the government of the use or benefit of its property. Second, the defendant argues that he was denied effective assistance of counsel at trial because his attorney stipulated to testimony of a USDA employee. Third, the defendant argues that the trial court abused its discretion in sustaining the government's objection to hearsay testimony. We disagree with all three arguments and affirm the judgments of conviction.

I.

The CCC, as a business arm of the USDA, purchases powdered milk and routes it to domestic or foreign aid programs, or stores it in various warehouses throughout the country. The CCC maintains a computer log of its milk purchases and the locations where it is stored. In addition, private industry may also purchase powdered milk which has become contaminated and thereby unfit for human use. Each week the CCC invites bids on off-conditioned milk sold strictly for use as animal feed.

On July 23, 1980, the CCC contracted with defendant, president of Green River Development Corporation ("Green River"), to store CCC owned powdered milk at the Green River facility near Dixon, Illinois. The contract did not contain any provision allowing defendant to sell powdered milk from his warehouse. The CCC, however, customarily allows warehousemen to sell small quantities (up to thirty bags) of milk damaged in the warehouse to allow a warehouseman to offset his liability to the government for damaged milk. Under no other circumstances is a warehouseman authorized to sell the government's milk.

The CCC requires a minimum net worth on the part of the warehouseman to ensure that the value of its commodity stored in the warehouse is protected. In August 1982, the CCC determined that defendant failed to demonstrate the minimal net worth requirement sufficient to maintain its storage contract. The CCC discontinued milk shipments to Green River and began to ship milk out of the facility, greatly reducing Green River's revenues.

In September 1983, the CCC received reports that defendant's milk showed indications of rodent, insect, and moisture contamination due to improper storage. This kind of contamination would preclude use of the milk for human consumption through the government aid programs. During the last quarter of 1984, the defendant filed bankruptcy. On December 10, 1984, the CCC stopped all payments to Green River.

About this time, the defendant called Frank Weiman, a CCC employee, and asked if he could purchase some of the powdered milk at Green River. Weiman explained the circumstances under which the defendant could buy milk and suggested that the defendant think it over and call Weiman back. Weiman never heard from the defendant again. In November, 1984, the defendant began selling damaged milk to George Mendez, owner of a railroad salvage business in Harvey, Illinois. The defendant made thirteen sales of powdered milk to Mendez for a total of $278,564. After discovering that some of the powdered milk was contaminated and that much of it was missing, the CCC sealed the buildings at Green River and placed the premises under surveillance.

On April 10, 1985 the defendant was indicted. The trial began July 8, 1985. The jury found the defendant guilty as charged and this appeal followed.

II.

Defendant first argues that there is insufficient evidence to prove that he intended to deprive the government of the use or benefit of the powdered milk. In support of this argument, defendant contends that he acted in a good faith belief that he had an implicit right to mitigate his contract losses by selling the contaminated milk before it deteriorated further.

The defendant relies on *Morissette v. United States*, 342 U.S. 246 (1952), to support his claim that the government failed to prove the fraudulent intent necessary to support a criminal conviction. In *Morissette*, the defendant claimed

a good faith belief that the property in question had been abandoned by the United States before he appropriated it. The court held that, although the defendant could still be liable civilly for the property appropriated, the claim would provide a proper defense to the embezzlement charge because the claim negated that aspect of fraudulent intent necessary to support a criminal conviction. The defendant argues that pursuant to the terms of the contract, Green River was responsible for all loss and injury to the powdered milk under its care. He argues that, as the milk diminished in value, he was concerned that he would be stuck for the "whole ball of wax" (Tr. 293) and that his conduct did not reflect a wrongful intent, but rather a desire to mitigate a growing loss. The evidence at trial, however, overwhelmingly established defendant's criminal intent in two specific ways. First, the financial problems defendant was faced with provided a powerful motive for him to turn the government's milk into quick cash for himself and his failing businesses. Second, the defendant misrepresented to Mendez that he received periodic authorization from the CCC to sell outdated milk. In addition, a good portion of defendant's testimony corroborated the government's case. For example, defendant acknowledged that he had sold the government's milk without authorization from the CCC. He also acknowledged that he paid none of the proceeds he received from Mendez to the CCC. Rather, defendant admitted that he spent the money on luxury items and business expenses. The evidence shows that defendant's lack of equity in his business caused the CCC to begin to sever its ties with him. His poor maintenance of the Green River warehouse and storage of CCC's milk prompted the government to expedite its severance of the contract. This loss of revenue, together with defendant's other financial problems and his use of the money, show that he had both motive and intent to sell the powdered milk.

A defendant seeking to reverse a conviction for insufficient evidence "bears the heavy burden of showing that the evidence, viewed in the light most favorable to the

government, could not have persuaded any rational trier of fact of defendant's guilt beyond a reasonable doubt." *United States v. Balistrieri*, 778 F.2d 1266 (7th Cir. 1985). Defendant does not meet this burden. When applying this standard, there is substantial evidence from which the jury could rationally have found that the defendant intended to deprive the CCC of the use and benefit of its milk.

III.

Defendant's argument that he was denied effective assistance of counsel and thus due process of law because his attorney stipulated to testimony of a USDA employee must also fail. In support of this argument, defendant contends that his attorney's conduct brought the defendant's credibility into disrepute before the jury. Defendant argues that he testified under oath that he had had a number of telephone conversations with Elmer Forrest, a USDA employee, concerning his letters of termination and the impending termination itself of the storage contract. Yet, his attorney stated in open court that, were Forrest to testify, Forrest would state that he could not recall any such conversations. Defendant contends that this conduct constitutes a denial of effective representation.

The test for ineffectiveness of counsel is whether the counsel's conduct so undermined the proper functioning of the trial that the adversarial process was unjust. *Strickland v. Washington*, 761 U.S. 394, 104 S.Ct. 2052 (1984). The defendant must show that his counsel's actions or omissions at trial "fell below an objective standard of reasonableness," 104 S.Ct. at 2065-66, and that a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068. The decision to agree to the stipulation is a tactical one. It is well settled law that "counsel will not be regarded constitutionally deficient merely because of tactical decisions," *Griffin v. Wainwright*, 760 F.2d 1505, 1513 (11th Cir. 1985), and that "the court must

defer to counsel's perspective," *United States v. Appoloney,* 761 F.2d 520, 525, *cert. denied,* 106 S.Ct. 348 (1985).

It is evident that if the stipulation had not been made between the prosecution and the defense counsel, the government would have called Mr. Forrest and he would have testified that he could not recall any conversations with the defendant regarding the termination of the storage agreement. Defendant's counsel used good trial strategy and perhaps saved the defendant the harm that was almost certain to occur if Forrest were called to testify and then called the defendant a liar in open court.

IV.

Defendant's argument that the trial court abused its discretion when it sustained the government's objection to hearsay testimony is without merit. The government objected to the following question put to Robert Maresh, a government witness, on cross-examination:

> Do you ever remember any of a conversation between Mr. Kennedy and some of the inspectors when Mr. Kennedy commented about them getting their milk out of the warehouse?

(Tr. 212).

The basis of the government's objection was that the question called for a hearsay answer. On that ground the court sustained the objection.

Rule 801(c) of the Federal Rules of Evidence provides that, "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." On appeal, defendant contends that the court erred in its ruling since the hearsay, doctrine does not cover "verbal conduct." The defendant failed to raise this argument below and cannot now present this issue as a ground for reversal. *United States v. Nero,* 733 F.2d 1197, 1207 (7th Cir. 1984).

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit